A

RHB BANK BHD v. TRAVELSIGHT (M) SDN BHD & ORS AND ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
AHMAD MAAROP FCJ
HASAN LAH FCJ
B ZALEHA ZAHARI FCJ
JEFFREY TAN FCJ
RAMLI ALI FCJ
[CIVIL APPEALS NO: 02(f)-36-07-2013(W) & 02(f)-38-07-2013(W)]
20 NOVEMBER 2014

C

CONTRACT: *Assignment – Assignment of rights, title and benefit of sale and purchase agreement – Assignment by borrower to bank – Borrower fully satisfied loan facility – Effect upon rescission of sale and purchase agreement – Whether security will be lost – Whether assignment will be affected – Whether bank to*
D *reassign property or rights, title and benefit of sale and purchase agreement to borrower*

CONTRACT: *Rescission – Sale and purchase agreement – Purchaser paid full purchase price – Effect of – Restitutio ad integrum – Whether there was mutual restitution – Whether purchaser entitled to refund – Whether property would vest*
E *with vendor*

TRUSTS: *Constructive trust – Resulting trust – Failure of mutual restitution upon rescission of sale and purchase agreement – Purchaser paid full purchase price – Whether unconscionable for owner of legal title to assert beneficial interest – Whether give rise to constructive trust*

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Travelsight (M) Sdn Bhd ('Travelsight') entered into an agreement with Atlas Corporation Sdn Bhd ('Atlas') to purchase a property which was partly financed by the bank ('RHB') with the property as the security. By a deed of assignment, Travelsight absolutely assigned its rights, interests and title in the property to the bank. On 2 April 1997, Atlas confirmed receipt of full
G purchase price. However, on 6 November 2001, Travelsight and the bank filed an action against Atlas for a declaration that Atlas had breached the terms of the sale and purchase agreement and that Travelsight had rightfully terminated/rescinded the agreement. By an order dated 15 November 2002, the court granted the declaration sought and ordered refund of all monies
H paid. Atlas failed to comply with the order. In the meantime, Travelsight continued with the repayment to the bank until the loan facility and the interest were fully paid. Subsequently, Atlas was wound up and the liquidators of Atlas refused to comply with the order of 15 November 2002 and took the stand that Travelsight was an unsecured creditor who ranked
I *pari passu* with other unsecured creditors and the liquidators were free to deal with the property as an unencumbered asset. Travelsight thus filed an action pursuant to ss. 236 and 279 of the Companies Act 1965 to set aside the act and/or decision of the liquidators to sell the property and to prohibit them

from selling and/or transferring the property, and for an order to declare that the property was held by the liquidators upon trust for Travelsight. The court dismissed the action by Travelsight. Subsequently, Travelsight was informed by RHB that RHB would not execute the deed of release and reassignment of the securities and secured properties on the ground that the right of Travelsight to the property was lost upon rescission of the agreement. Travelsight therefore commenced an action against RHB for: (i) a declaration that Travelsight had fully settled the loan facility; (ii) a declaration that RHB had breached its undertaking to execute the deed of receipt and reassignment; (iii) a mandatory injunction to compel RHB to execute the deed of receipt and reassignment, in default of which, the refund by RHB of all sums paid towards the loan facility; (iv) a mandatory injunction to compel RHB to furnish a detailed statement of the overdraft account; and (v) general and special damages. RHB defended the action on the ground that the right of Travelsight to the property was lost upon rescission of the agreement. The trial court granted the declarations and injunctions sought by Travelsight and thus, RHB appealed to the Court of Appeal. Atlas and the liquidators also applied to the Court of Appeal to intervene in the appeal as appellants, contending breach of natural justice and that the order of the trial court had adversely affected their rights as the findings were made in their absence. The Court of Appeal allowed the application by Atlas and the liquidators. However, the appeals by RHB, Atlas and the liquidators were dismissed by the Court of Appeal. Hence, the appeals by RHB against Travelsight, Atlas and the liquidators on one part and by Atlas and the liquidators against Travelsight on another, on the following questions: (i) whether an assignment of all rights, title and benefit of a sale and purchase agreement would be ineffective upon the order for the rescission of the sale and purchase agreement; and (ii) whether a recipient bank of an assignment of a sale and purchase agreement that has been rescinded by an order for rescission has any contractual right or obligation to reassign: (a) the property (the subject matter of the sale and purchase agreement); and/or (b) the rights, title and benefit in and to the sale and purchase agreement, to the assignor/borrower upon full payment of the loan.

Held (allowing appeal by RHB; dismissing appeal by Atlas and liquidators with costs)

Per Jeffrey Tan FCJ delivering the judgment of the court:

(1) The issue, as to whether there was anything to reassign, was as good as settled by the order dated 15 November 2002, which declared that the rescission of the purchase was valid and ordered a refund of the purchase price. Where it was Travelsight's election to rescind the purchase and the court was only moved to validate the antecedent act of rescission by Travelsight, it was rescission at common law, where *restitutio ad integrum* was *de riqueur*. (paras 11 & 13)

(2) Where a transaction is rescinded there must be mutual restitution. Money must be repaid and the property returned. Atlas/liquidators must make restitution of the purchase price before counter-restitution of the property. In spite of the order of 15 November 2002, Atlas/liquidators refused to refund the purchase price but yet claimed the property. The property would not vest with Atlas/liquidators without restitution of the purchase price but with Travelsight as purchaser and RHB as assignee. (para 13)

(3) When the full purchase price was paid in 1997, the property belonged to Travelsight as purchaser and RHB as assignee and ceased to be an asset of Atlas. But with rescission, the property would revert to Atlas, only by way of mutual restitution. However, mutual restitution did not follow. Thus, the liquidators could not deal with the property as the beneficial property of Atlas, as without mutual restitution, the property would not revert to Atlas. (paras 30 & 31)

(4) A constructive trust arises whenever the circumstances are such that it would be unconscionable of the owner of the legal title to assert his own beneficial interest and deny the beneficial interest of another. Atlas and the liquidators should have known that the property was not that of Atlas to deal and dispose as its own. It would therefore be unconscionable of Atlas and the liquidators to treat the property as unencumbered asset and deny the beneficial interest of Travelsight and RHB and therefore, it gave rise to a constructive trust. (paras 30 & 31)

(5) Upon failure of mutual restitution, a resulting trust arose as reversion of the property to Atlas was wholly reliant on mutual restitution. Atlas and the liquidators still disposed of the property on 16 June 2011 and refused to refund the purchase price, in defiance of the order dated 15 November 2002 and in breach of the duty imposed by equity to account. Hence, Atlas should not be allowed to benefit from the rescission. The conduct was wholly unconscionable and therefore no order could be made in favour of Atlas and the liquidators. In the circumstances, Travelsight and RHB had a proprietary right to the refund. (paras 31 & 32)

(6) The assignment is the security of the bank and the security will be lost upon a valid rescission of the sale and purchase agreement. However, the assignment remains and the bank is nonetheless the assignee of the rights that will accrue to the borrower upon rescission of the sale and purchase agreement. Hence, while the order of rescission will affect the security of the bank, it will not affect the assignment nor the standing of the bank as assignee and or creditor of the borrower, or the equitable right of the bank to lay first claim to the money or property to be restituted, to discharge the outstanding loan. (para 35)

(7) Both Travelsight and RHB had agreed to relinquish the property and what would be restituted was a refund of money. It would be unreasonable to hold the bank to reassign the property. After rescission, Travelsight could not rely on the sale and purchase agreement to give it a clear title to the property, such that Travelsight could not rely on the assignment to give it the clear title. At most, RHB could only be held to assign the proprietary right to the refund and/or the rights for enforcing the same. (para 33)

[Atlas and liquidators to refund the purchase price together with all interests computed as per order dated 15 November 2002 to Travelsight. All orders of the courts below set aside save and except for the declaration that Travelsight had paid the full purchase price.]

Bahasa Malaysia *Translation Of Headnotes*

Travelsight (M) Sdn Bhd ('Travelsight') memasuki perjanjian dengan Atlas Corporation Sdn Bhd ('Atlas') untuk membeli suatu hartanah yang dibiaya sebahagiannya oleh bank ('RHB') dengan hartanah tersebut sebagai sekuriti. Melalui surat peletakhakkan, Travelsight meletak hak secara mutlak, hak-hak, kepentingan-kepentingan dan hak miliknya dalam hartanah tersebut kepada bank. Pada 2 April 1997, Atlas mengesahkan penerimaan harga belian penuh. Walau bagaimanapun, pada 6 November 2001, Travelsight dan bank memfailkan tindakan terhadap Atlas untuk deklarasi bahawa Atlas telah melanggar terma-terma perjanjian jual beli dan bahawa Travelsight telah dengan betul menamatkan/membatalkan perjanjian. Melalui suatu perintah bertarikh 15 November 2002, mahkamah membenarkan deklarasi yang dipohon dan memerintahkan pembayaran balik kesemua wang yang telah dibayar. Atlas gagal mematuhi perintah tersebut. Sementara itu, Travelsight meneruskan dengan pembayaran kepada bank sehingga kemudahan pinjaman dan faedah dibayar sepenuhnya. Kemudian, Atlas digulungkan dan pelikuidasi-pelikuidasi Atlas enggan mematuhi perintah 15 November 2002 dan menyatakan bahawa Travelsight adalah pemiutang tanpa cagaran yang setaraf dengan pemiutang tanpa cagaran yang lain dan pelikuidasi-pelikuidasi berhak menguruskan aset tersebut sebagai aset tak dihalang. Travelsight oleh itu memfailkan tindakan menurut ss. 236 dan 279 Akta Syarikat 1965 untuk mengenepikan tindakan atau keputusan pelikuidasi-pelikuidasi untuk menjual hartanah tersebut dan menghalang mereka daripada menjual dan/atau memindah milik hartanah tersebut, dan untuk perintah mengisytiharkan hartanah tersebut dipegang oleh pelikuidasi-pelikuidasi dalam amanah untuk Travelsight. Mahkamah menolak tindakan Travelsight. Kemudian, Travelsight diberitahu oleh RHB bahawa RHB tidak akan memeterai surat ikatan pelepasan dan penyerahan semula hak terhadap sekuriti-sekuriti dan hartanah yang dijamin atas alasan bahawa hak Travelsight terhadap hartanah lupus sebaik sahaja perjanjian dibatalkan. Travelsight oleh itu memulakan tindakan terhadap RHB bagi: (i) satu deklarasi bahawa Travelsight telah menyelesaikan dengan penuh kemudahan

pinjaman; (ii) deklarasi bahawa RHB telah melanggar akujanjinya untuk memeterai surat ikatan penerimaan dan penyerahan semula hak; (iii) injunksi mandatori untuk memaksa RHB memeterai surat ikatan penerimaan dan penyerahan semula hak, jika gagal, pengembalian oleh RHB kesemua wang yang dibayar bagi kemudahan pinjaman; (iv) injunksi mandatori untuk memaksa RHB memberikan penyata terperinci akaun overdraf; dan (v) ganti rugi am dan khusus. RHB membela tindakan tersebut atas alasan bahawa hak Travelsight terhadap hartanah telah hilang sebaik sahaja pembatalan perjanjian tersebut. Mahkamah bicara membenarkan deklarasi-deklarasi dan injunksi-injunksi yang dipohon oleh Travelsight dan oleh itu, RHB merayu kepada Mahkamah Rayuan. Atlas dan pelikuidasi-pelikuidasi juga memohon kepada Mahkamah Rayuan supaya campur tangan dalam rayuan sebagai perayu-perayu, menghujahkan pelanggaran keadilan asasi dan bahawa perintah mahkamah bicara telah menjejaskan hak mereka kerana dapatan tersebut tidak dibuat dalam kehadiran mereka. Mahkamah Rayuan membenarkan permohonan Atlas dan pelikuidasi-pelikuidasi. Walau bagaimanapun, rayuan-rayuan oleh RHB, Atlas dan pelikuidasi-pelikuidasi ditolak oleh Mahkamah Rayuan. Dengan itu rayuan-rayuan oleh RHB terhadap Travelsight, Atlas dan pelikuidasi-pelikuidasi di satu pihak dan oleh Atlas dan pelikuidasi-pelikuidasi terhadap Travelsight di satu lagi pihak, atas persoalan-persoalan berikut: (i) sama ada penyerahan hak kesemua hak, hak milik dan manfaat dalam perjanjian jual beli tidak akan berkesan selepas perintah pembatalan perjanjian jual beli; dan (ii) sama ada bank penerima penyerahan hak perjanjian jual beli yang telah dibatalkan oleh suatu perintah untuk pembatalan mempunyai apa-apa hak kontrak atau kewajipan untuk menyerahkan semula: (a) hartanah (subjek perkara perjanjian jual beli); dan/atau (b) hak, hak milik dan manfaat dalam dan kepada perjanjian jual beli, kepada penyerah hak/peminjam selepas pembayaran penuh pinjaman.

Diputuskan (membenarkan rayuan oleh RHB; menolak rayuan oleh Atlas dan pelikuidasi-pelikuidasi dengan kos)
Oleh Jeffrey Tan HMP menyampaikan penghakiman mahkamah:

(1) Isu sama ada terdapat apa-apa untuk diletakhakkan, dianggap telah selesai oleh perintah bertarikh 15 November 2002 yang mengisytiharkan bahawa pembatalan pembelian adalah sah dan memerintahkan pemulangan harga belian. Apabila Travelsight memilih untuk membatalkan pembelian dan permohonan kepada mahkamah adalah hanya untuk mengesahkan tindakan pembatalan sebelumnya oleh Travelsight, ia adalah pembatalan dalam common law, di mana *restitutio ad integrum* adalah *de riqueur*.

(2) Apabila sesuatu transaksi dibatalkan perlu ada pemulangan bersama. Wang perlu dibayar balik dan hartanah dipulangkan. Atlas/pelikuidasi-pelikuidasi mesti memulangkan harga belian sebelum pemulangan balas hartanah. Walaupun dengan perintah bertarikh 15 November 2002, Atlas/pelikuidasi-pelikuidasi enggan memulangkan harga belian tetapi

menuntut hartanah. Hartanah tersebut tidak akan diletak hak kepada Atlas/pelikuidasi-pelikuidasi tanpa pemulangan harga belian tetapi kepada Travelsight sebagai pembeli dan RHB sebagai pemegang serah hak.

(3) Apabila harga belian penuh dibayar dalam tahun 1997, hartanah tersebut adalah milik Travelsight sebagai pembeli dan RHB sebagai pemegang serah hak dan bukan lagi aset Atlas. Tetapi dengan pembatalan, hartanah tersebut akan kembali kepada Atlas, hanya dengan cara pemulangan bersama. Walau bagaimanapun, pemulangan bersama tidak berlaku. Oleh itu, pelikuidasi-pelikuidasi tidak boleh menguruskan hartanah tersebut sebagai hartanah benefisial Atlas, kerana tanpa pemulangan bersama, hartanah tersebut tidak akan dikembalikan kepada Atlas.

(4) Amanah konstruktif timbul apabila hal keadaan adalah di mana ia tidak berpatutan kepada pemilik hak milik sah untuk menuntut kepentingan benefisialnya sendiri dan menafikan kepentingan benefisial yang lain. Atlas dan pelikuidasi-pelikuidasi sepatutnya mengetahui bahawa hartanah tersebut bukan milik Atlas untuk diuruskan dan dilupuskan seperti miliknya. Oleh itu, adalah tidak berpatutan bagi Atlas dan pelikuidasi-pelikuidasi untuk menguruskan hartanah tersebut sebagai aset yang tiada halangan dan menafikan kepentingan benefisial Travelsight dan RHB dan dengan itu, membangkitkan amanah konstruktif.

(5) Atas kegagalan pemulangan bersama wujud amanah berbangkit, kerana pemulangan hartanah tersebut kepada Atlas adalah bergantung sepenuhnya kepada pemulangan bersama. Atlas dan pelikuidasi-pelikuidasi masih menguruskan hartanah tersebut pada 16 Jun 2011 dan enggan memulangkan harga belian, dengan mengingkari perintah bertarikh 15 November 2002 dan dengan melanggar kewajipan yang dikenakan oleh ekuiti untuk bertanggungjawab. Oleh itu, Atlas tidak boleh dibenarkan untuk mendapat manfaat daripada pembatalan tersebut. Tindakan tersebut adalah amat tidak berpatutan dan dengan itu, tidak ada perintah yang boleh dibuat yang memihak kepada Atlas dan pelikuidasi-pelikuidasi. Dalam keadaan tersebut, Travelsight dan RHB mempunyai hak milikan kepada pemulangan.

(6) Penyerahan hak adalah jaminan bank dan jaminan tersebut akan luput apabila terdapat pembatalan sah perjanjian jual beli. Walau bagaimanapun, penyerahan hak tersebut kekal dan bank adalah pemegang serahan hak-hak yang akan terakru kepada peminjam atas pembatalan perjanjian jual beli. Oleh itu, walaupun perintah pembatalan akan menjejaskan jaminan bank, ia tidak akan menjejaskan penyerahan hak atau hak bank sebagai pemegang serahan hak atau pemiutang kepada peminjam, atau hak ekuiti bank untuk mendapatkan tuntutan pertama kepada wang atau hartanah yang akan dipulangkan, untuk melepaskan hutang tertunggak.

(7) Travelsight dan RHB kedua-duanya telah bersetuju untuk melepaskan hartanah tersebut dan apa yang akan dipulangkan adalah pembayaran balik wang. Adalah tidak munasabah untuk mengarahkan bank menyerah hak semula hartanah tersebut. Selepas pembatalan, Travelsight tidak boleh menyandar atas perjanjian jual beli untuk memberikannya hak milik sah kepada hartanah, dengan itu Travelsight tidak boleh menyandar atas penyerahan hak untuk memberikannya hak milik sah. Paling tidak, RHB hanya boleh diputuskan untuk menyerah hak milikan kepada pengembalian wang dan/atau hak-hak untuk melaksanakannya.

[Atlas dan pelikuidasi-pelikuidasi perlu memulangkan harga belian bersama-sama dengan kesemua faedah dikira seperti dalam perintah bertarikh 15 November 2002 kepada Travelsight. Kesemua perintah mahkamah-mahkamah bawahan diketepikan kecuali deklarasi bahawa Travelsight telah membayar harga belian penuh.]

Case(s) referred to:

Admiral Cove Development Sdn Bhd v. Balakrishnan Devaraj & Anor [2011] 9 CLJ 133 FC ***(refd)***

Banque Belge pour l'Etranger v. Hambrouck [1921] 1 KB 321 ***(refd)***

Beatty v. Guggenheim Exploration Co, 122 NE 378 ***(refd)***

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd [1981] Ch 105 ***(refd)***

Ching Mun Fong v. Liu Cho Chit [2001] 3 SLR 10 ***(refd)***

Demand Information plc (in administrative receivership) and Another v. Michael Gerson (Finance) plc and Another [2000] All ER (D) 1139 ***(refd)***

Despina Papamichael v. National Westminster Bank and Anor [2003] EWHC 164 ***(refd)***

Dunbar Bank plc v. Nadeem and Another [1998] 3 All ER 876 ***(refd)***

El Ajou v. Dollar Land Holdings plc [1993] 3 All ER 717 ***(refd)***

Erlanger v. New Sombrero Phosphate Company (1878) 3 App Cas 1218 ***(refd)***

Foskett v. McKeown [2000] 3 All ER 97 ***(refd)***

Greater Pacific Investments Pty Ltd (in Liq) v. Australian National Industries Ltd (1996) 39 NSWLR 143 ***(refd)***

Halley v. The Law Society [2003] EWCA Civ 97 ***(refd)***

Halifax Building Society v. Thomas [1996] Ch 217 ***(refd)***

Independent Trustee Services Ltd v. GP Noble Trustees Ltd [2012] EWCA Civ 195 ***(refd)***

Koh Siew Keng & Anor v. Koh Heng Jin [2008] 3 CLJ 450 CA ***(refd)***

LAC Mineral v. International Corona Resources Ltd (1989) 61 DLR (4th) 14 ***(refd)***

Lipkin Gorman v. Karpnale Ltd [1991] 2 AC 548 ***(refd)***

London Allied Holdings Ltd v. Lee and Others [2007] EWHC 2061 (Ch) ***(refd)***

Lonrho Plc v. Fayed (No 2) [1992] 1 WLR 1 ***(refd)***

Lord Napier and Ettrick and Another v. Hunter and Others; Lord Napier and Ettrick v. R F Kershaw Ltd and Others [1993] AC 713 ***(refd)***

LSSC Development Sdn Bhd v. Thomas Iruthayam and Anor [2007] 2 CLJ 434 CA ***(refd)***

Metall und Rohstoff AG v. Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391 ***(refd)***

Muschinski v. Dodds (1985) 62 ALR 429 ***(refd)***

Newbigging v. Adam (1886) 34 Ch D 582 ***(refd)***

Otkritie International Investment Management Ltd and Others v. Urumov (also known as George Urumov) and Others [2014] EWHC 191 ***(refd)***

Re Goldcorp Exchange Ltd (In Receivership): Kensington v. Liggett [1994] 3 NZLR 385 ***(refd)***
Re Polly Peck (No 2) [1998] 3 All ER 812 ***(refd)***
RHB Bank Bhd v. Travelsight (M) Sdn Bhd [2014] 1 MLJ 691 ***(refd)***
Securities and Investments Board v. Pantell SA and Others (No 2) [1993] 1 All ER 134 ***(refd)***
Shalson and Others v. Russo and Others [2003] EWHC 1637 (Ch) ***(refd)***
Sim Thong Realty Sdn Bhd v. Teh Kim Dar [2003] 3 CLJ 227 CA ***(refd)***
Solle v. Butcher [1950] 1 KB 671 ***(refd)***
Spence v. Crawford [1939] 3 All ER 271 ***(refd)***
Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors And Another Appeal [2009] 2 CLJ 363 ***(refd)***
Travelsight (M) Sdn Bhd & anor v. Atlas Corporation Sdn Bhd [2003] 6 CLJ 344 HC ***(refd)***
Twinsectra Ltd v. Yardley and Others [1999] All ER (D) 433 ***(refd)***
UBS AG v. Stand Ford International Enterprises Ltd & ors [2002] 3 HKC 621 ***(refd)***
Vadasz v. Pioneer Concrete (SA) Pty Ltd (1995) 130 ALR 570 ***(refd)***
Westdeutsche Landesbank Girozentrale v. Islington London BC [1996] AC 669 ***(refd)***
Wuhan Guoyu Logistics Group Co Ltd & Anor v. Emporiki Bank of Greece SA [2013] EWCA Civ 1679 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 236, 279

Other source(s) referred to:
Birks An Introduction to the Law of Restitution, 1985, p 423
Hanbury & Martin*, Modern Equity,* p 328
Meagher, Gummow and Lehane's Equity, Doctrines and Remedies, 2nd edn, p 327
Professor Robert Pearce and John Stevens, *The Law of Trusts and Equitable Obligations,* 4th edn, p 324
Restitution and Constructive Trusts, 1988, Law Quarterly Review, vol 114 p 399

(Civil Appeal No: 02-36-07-2013(W))
For the appellant - Andrew Teh (Foong Mun Yee with him); M/s Wong Lu Peen & Tunku Alina
For 1st respondent - Wong Rhen Yen (Kenwayne Goik with him); M/s Hanif Idris & Assocs
For 2nd, 3rd & 4th respondents - Joy W Appukuttan (Mega Mohammad with him); M/s SK Yeoh & Partners

(Civil Appeal No: 02-38-07-2013(W))
For the appellants - Joy W Appukuttan (Mega Mohammad with him); M/s SK Yeoh & Partners
For the respondent - Wong Rhen Yen (Kenwayne Goik with him); M/s Hanif Idris & Assocs

Reported by S Barathi

JUDGMENT

Jeffrey Tan FCJ:

[1] The questions upon which leave was granted to RHB Bank Berhad to appeal in Civil Appeal 02-36-2013(W), and to Atlas Corporation Sdn Bhd (in liquidation) and liquidators, namely Taufiq Ahmad @ Ahmad Mustapha bin

Ghazali and Mak Kam Choon to appeal in Civil Appeal 02-38-2013(W), against the order of the Court of Appeal in respect of the matter decided by the High Court in the exercise of its original jurisdiction, read:

RAYUAN SIVIL NO: 02(f)-36-07/2013(W)

1. Sama ada penyerahanhak (assignment) ke semua hak, hak milik dan manfaat di dalam perjanjian jual beli tidak akan (lagi) berkesan selepas (setelah) suatu perintah bagi pembatalan perjanjian jual beli itu?

2. Sama ada bank yang menerima suatu penyerahanhak perjanjian jual beli yang telah dibatalkan oleh suatu perintah bagi pembatalan mempunyai apa-apa hak atau obligasi kontrak untuk menyerah hak semula.

3. Sama ada satu penerima bank (receipient bank) di bawah perjanjian jual beli yang telah dibatalkan (rescinded) oleh suatu Perintah Pembatalan (Order for Rescission) mempunyai apa-apa hak di bawah kontrak atau obligasi (contractual right or obligation) untuk menyerah hak semula (reassign);

   (i) hartanah itu (subject perjanjian jual beli itu) dan/atau;

   (ii) harta (hal perkara perjanjian jual beli);

   (iii) hak-hak milik dan manfaat di dalam perjanjian jual beli kepada pemberi serahanhak (assignee)/peminjam selepas pembayaran penuh pinjaman (loan).

RAYUAN SIVIL NO: 02(f)-38-07/2013(W)

1. Whether an assignment of all rights, title and benefit of a sale and purchase agreement would be ineffective upon the order for the rescission of the sale and purchase agreement?

2. Whether a recipient bank of an assignment of a sale and purchase agreement that has been rescinded by an order for rescission has any contractual right or obligation to reassign;

   (i) the property (the subject matter of the sale and purchase agreement); and/or

   (ii) the rights, title and benefit in and to the sale and purchase agreement, to the assignor/borrower upon full payment of the loan?

[2] The background facts could be summarised as follows. On 15 March 1996, Travelsight (M) Sdn Bhd (hereinafter referred to as 'Travelsight') entered into an agreement to purchase property described as Suite No. 1202, Tower B, Wisma Pantai, Kuala Lumpur (hereinafter referred to as 'the property') from Atlas Corporation Sdn Bhd (hereinafter referred to as 'Atlas') for RM816,696. Travelsight paid RM216,696 towards the purchase price. The balance was financed by the Development and Commercial Bank Berhad (now known as RHB Bank Berhad, hereinafter referred to as 'RHB') who granted a loan facility of RM600,000 (made up of a term loan of RM400,000

and an overdraft of RM200,000) to Travelsight to purchase the property, with the property as the security. At that point in time, given that a separate document of title to the property had yet to be issued, Travelsight could only assign its rights, interests and title in the property to the Development and Commercial Bank Berhad. By a deed of assignment dated 6 December 1996, Travelsight absolutely assigned its rights, interests and title in the property to the Development and Commercial Bank Berhad. Later, by letter dated 2 April 1997, Atlas confirmed that the full purchase price had been paid. On 6 November 2001, Travelsight and the Development and Commercial Bank Berhad filed action (Kuala Lumpur 24-4147-2001) (hereinafter referred to as 'the 2001 action') against Atlas for "a declaration that (Atlas) has breached the terms of the sale and purchase agreement dated 15 March 1996 and that (Travelsight) has rightfully terminated/rescinded the said sale and purchase agreement *via* a letter dated 13 February 2001 or whichever date the honourable court finds just and fair or in the alternative a declaration that the sale and purchase agreement is hereby rescinded due to the breach of contract by (Atlas)".

[3] The 2001 action was tried by Abdul Malik Ishak J, as he then was, who held, on 15 November 2002, that the material representation by Atlas was false, in that the size of the property was smaller than had been represented, it being 1,470 square feet instead of 1,592 square feet (see *Travelsight (M) Sdn Bhd & anor v. Atlas Corporation Sdn Bhd* [2003] 6 CLJ 344; [2003] 6 MLJ 658). Abdul Malik Ishak J granted the sought declaration and ordered a refund of all monies paid and the application of the refund together with judgment interest towards redemption of the property. On 13 December 2002, Atlas filed an appeal against the order dated 15 November 2002. But the appeal was withdrawn. Hence, the order of Abdul Malik Ishak J dated 15 November 2002 became final. But still, Atlas would not comply with the order dated 15 November 2002. Meantime, Travelsight continued with repayment to the Development and Commercial Bank Berhad and later to RHB, until the loan facility of RM600,000 and interest thereon were repaid in full, and with payment of the assessment levied on the property.

[4] In the interim, on 20 February 2004, Atlas was wound up on the petition of one Lee Chiu Hing Realty Sdn Bhd. The liquidators of Atlas refused to comply with the order dated 15 November 2002 and took the stand that Travelsight was an unsecured creditor who ranked *pari passu* with other unsecured creditors, while they, the liquidators, were free to deal with the property as an unencumbered asset. When steps were taken by the liquidators to invite tenders for the property, Travelsight filed action (Kuala Lumpur 28-946-2008) (hereinafter referred to as 'the 2008 action'), pursuant to ss. 236 and 279 of the Companies Act 1965, for orders to set aside the act and or decision of the liquidators to sell the property and to prohibit them from selling and or transferring the property, and for an order to declare that

A the property was held by the liquidators upon trust for Travelsight. But that 2008 action was dismissed by Kang Hwee Gee J, as he then was, who held, on 13 May 2009, as follows:

> Having heard the parties on the facts, I am convinced that there is no truth in the submission that the respondent company (Atlas) would be
B retaining both the loan sum that had been paid to the respondent as well as the property paid and purchased by the applicant (Travelsight). It is clear to me that if the liquidators of the respondent do not pay the applicant the sum as ordered by Abdul Malik Ishak J in his judgment, *supra*, the property will remain with the bank. There is therefore no justification to construct a remedial trust under the circumstances.

C

[5] Travelsight filed but withdrew its appeal against the order of Kang Hwee Gee J. On 29 June 2009, Travelsight requested RHB to commence action to take possession of the property, to auction it, and to apply the proceeds towards the loan. RHB declined.

D **[6]** By March 2011, Travelsight had fully settled its outstanding loan. By letter dated 8 March 2011, RHB undertook that it would instruct its solicitors to allow Travelsight to appoint its own solicitors to prepare a "deed of receipt and reassignment of all securities and secured properties" for execution by RHB. But that was not carried through. By letters dated
E 8 March 2011 and 1 July 2011, RHB informed Travelsight that it would not execute the deed of release and reassignment, on the ground that the right of Travelsight to the property was lost upon rescission of the purchase agreement dated 15 March 1996. In response, Travelsight filed the instant action against RHB for the following reliefs: (i) a declaration that Travelsight
F had fully settled the loan facility; (ii) a declaration that RHB had breached its undertaking to execute the deed of receipt and reassignment; (iii) a mandatory injunction to compel RHB to execute the deed of receipt and reassignment, in default of which, the refund by RHB of all sums paid towards the loan facility; (iv) a mandatory injunction to compel RHB to furnish a detailed statement of the overdraft account, and; (v) general and
G special damages. RHB defended the action on the ground that the right of Travelsight to the property was lost upon rescission of the purchase agreement dated 15 March 1996. At the trial court, learned counsel for RHB submitted that upon rescission of the purchase agreement "Atlas resumed its position as legal owner of the property", and that in the event that (RHB) is
H to discharge its rights over the property as assignee/chargee upon full settlement of monies due to RHB", RHB is legally bound to reassign the property to Atlas and or its liquidators. The trial court disagreed. The trial court held that pursuant to the order of Abdul Malik Ishak J dated 15 November 2002, the order of rescission of the purchase agreement was
I tied to the order of refund of the purchase price, and that RHB retained its rights to the property for so long as the said refund remained unpaid:

> The Court agrees with the submissions of learned counsel for the plaintiff that in the circumstances of this case where the RM816,696.00 ordered to be paid by Atlas to the defendant in that suit remains unpaid, the defendant in that suit would retain rights over the property. This finding is reinforced by the decision of Kang Hwee Gee J in 2009 when he found that if the liquidators fail to pay the sum as ordered by Malik J, 'the property will remain with the bank (defendant)'. His Lordship had categorically discounted any possibility of Atlas retaining both the sum that had been paid to them as well as the property. *The Court is of the considered view that to find otherwise would be to reward Atlas for the misrepresentation to the plaintiff in the first place and then again for failing to comply with court order to refund the monies paid.*
>
> *The court finds that since Atlas/the Liquidators have failed to refund the monies paid together with interest thereon, the property remains with the defendant bank.* (emphasis added)

[7] The trial court also emphatically disagreed with the submission "that the property should be reassigned to Atlas/liquidators, even in the circumstance where Atlas/liquidators had not complied with the order dated 15 November 2002 to refund the purchase price, and it was Travelsight who had paid the redemption sum". The trial court tersely remarked, "To lend credibility to the defendant's arguments would be tantamount to a case of rewarding the guilty and punishing the innocent". Need it be said that the sought declarations and injunctions were granted, on 16 June 2011.

[8] Against those orders of the trial court, RHB appealed to the Court of Appeal. Then the unexpected occurred. On or about 25 September 2012, Atlas and liquidators applied to the Court of Appeal to intervene in the said appeal as appellants. In affidavits filed in support of their application, Atlas and liquidators contended that the "findings" of the trial court, namely the above underlined, were made in their absence and without them being heard, that there was a breach of natural justice and that the order of the trial court had adversely affected their rights and therefore ought to be set aside. On 12 November 2012, the Court of Appeal allowed Atlas and liquidators to intervene in the appeal as appellants and to reply to the affidavits filed at the trial court (see 618AR), thus putting Atlas and liquidators as participants in the proceeding, as if from inception.

[9] The Court of Appeal (see *RHB Bank Bhd v. Travelsight (M) Sdn Bhd* [2014] 1 MLJ 691) perceived the case of RHB and Atlas/liquidators as follows:

> THE APPELLANT'S AND INTERVENERS' CASE
>
> The only issue before the High Court was whether the respondent was entitled in law to seek an order for the reassignment of the Wisma Pantai after the High Court had in the 2003 application ruled that the effect of the 2001 judgment was to reduce the respondent to the status of an unsecured creditor of Atlas. The thrust of the submission of learned counsel for the appellant was that following the decision in the 2001 suit that the sale and purchase agreement between the respondent and Atlas

was rescinded, the Wisma Pantai effectively reverted to Atlas. According to learned counsel for the appellant, the effect of the learned trial judge's order is to recognise a proprietary interest in Wisma Pantai in the respondent, when no such interest exists following the decision of the court in the 2001 suit. The inference being that there is nothing to reassign following the rescission of the sale and purchase agreement.

Learned counsel for the interveners apart from raising the same points of law raised by learned counsel for the appellant, also relied on s. 293 of the Companies Act 1965. Learned counsel for the interveners submitted that any recognition of the respondent as the owner of Wisma Pantai by the liquidators of Atlas would tantamount to a breach of s. 293 of the Companies Act 1965. The breach consisting of the respondent being treated as a preferred creditor upon the transfer of the Wisma Pantai to the respondent, when all unsecured creditors must be treated equally.

[10] In the opinion of the Court of Appeal, "the only issue for determination arising from the prayers in the originating summons is whether the appellant is obliged to reassign the (property) to the respondent pursuant to the contract between the parties. The answer to this question, in our opinion, depends on the terms of the contract between the appellant and the respondent and the equity of redemption inherent in every transaction involving the transfer of security pending repayment of a loan". Dismissing the appeals of RHB, Atlas and liquidators, the Court of Appeal then held that pursuant to cl. 37 of the loan agreement, the right of RHB to retain the property survived only for as long as there were monies due from Travelsight, that RHB "was contractually bound to reassign the property forming the subject matter of the security upon full satisfaction of the loan amount", and that regardless of the construction of the loan agreement "there was an obligation in equity on the appellant to reassign the security in the form of the (property)".

Based on the aforesaid principles of law, in our judgment, there is a clear obligation in equity upon the appellant to reassign the (property) following the payment in full of the loan. With respect, the submissions of learned counsel for the appellant and the interveners are premised on the assumption that the prayers granted by the learned trial judge are directed at Atlas. However, a careful examination of the prayers ordered by the court will reveal that the reliefs sought by the respondent and ordered by the court are solely directed at the appellant. We are conscious that the thrust of the submission of learned counsel for the appellant is that there is nothing to reassign following the rescission of the sale and purchase agreement. With respect, our answer to this submission is twofold. First, there is some doubt as to the entitlement of the liquidator of Atlas to sell (the property) without paying the monies ordered to be paid pursuant to the judgment in the 2001 suit. We are in agreement with the sentiments expressed by the learned trial judge that there is a case for contending that the order in the 2001 suit provided for rescission conditional on the refund of the purchase price. We also agree with the opinion of the learned trial judge that Kang Hwee Gee J (as he then was)

notwithstanding his ruling to not restrain the liquidators from selling (the property), nevertheless did state that his ruling was on the assumption that Atlas had refunded the purchase price pursuant to the order in the 2001 suit. Secondly, it must be appreciated that irrespective of the 'value' of the reassignment, the respondent requires a reassignment before it can acquire the *locus* to commence any form of proceedings against Atlas and/or its liquidators for the recovery of the monies ordered to be paid to it under the 2001 suit. We also pause to observe that consistent with its contractual obligations, the appellant did undertake to reassign the secured property *vide* its letter of 8 March 2011 and which undertaking was accepted by the respondent *vide* its letter of 22 April 2011. Indeed, the appellant even provided the format of the deed of receipt and reassignment. The appellant thereafter resiled from its undertaking citing 'pending legal issues' without providing any cogent reason as why it was anxious to protect the position of the third party Atlas to the detriment of its own customer. Accordingly, in our judgment, the issues raised in the submissions of learned counsel for the appellant and the interveners are clearly premature. These are issues, in our opinion, which need be addressed only in an action between the respondent and the liquidators of Atlas.

[11] The Court of Appeal opined that the issue of whether there was anything to reassign following the rescission of the purchase ought to be tried in a fresh action between Travelsight and the liquidators of Atlas. But we believe that that issue – whether there was anything to reassign – was as good as settled by the order dated 15 November 2002, which declared that the rescission of the purchase was valid and ordered a refund of the purchase price. The trial court and the Court of Appeal construed that order to mean that Travelsight retained its rights to the property for as long as the refund remained unpaid. But we read that order to mean *restitutio in integrum* in accord with the law on rescission of a contract which is "… I think, clear on principles of general justice that as a condition to a rescission there must be a *restitutio in integrum*. The parties must be put *in statu quo*" (*Erlanger v. New Sombrero Phosphate Company* (1878) 3 App Cas 1218 at 1278, per Lord Blackburn, who laid down the principles which would become the statement of the law). "It is well established that it is a condition of relief that the party obtaining rescission should make *restitutio in integrum* or, in modern terminology, counter restitution to the other party. If counter restitution cannot be made the claim to rescission fails: see *Erlanger v. New Sombrero Phosphate Co* (1878) 3 App Cas 1218, [1874–80] All ER Rep 271" (*Dunbar Bank plc v. Nadeem and Another* [1998] 3 All ER 876 per Millett, Morritt and Potter LJJ). "The requirement is that the party seeking to rescind a contract, and recover what he transferred under the contract, must be able to give back everything that he received under the contract. If in the circumstances of a particular case it is impossible for the party seeking restitution to make full counter restitution (for example, if he has sold the thing received to an innocent third party) then that impossibility can constitute a bar to rescission … whereas the common law took a strict approach to the requirement that counter-restitution must be possible, equity adopted a more flexible attitude to this requirement" (*Duress, Undue Influence and Unconscionable Dealing*, 2nd

edn. by Nelson Enonchong, para. 28-009). "Equity does not insist on exact counter restitution but is willing to make adjustments in money, so long as the results are practical and just" (On *Demand Information plc (in administrative receivership) and another v. Michael Gerson (Finance) plc and another* [2000] All ER (D) 1139 per Robert Walker LJ) (see *Securities and Investments Board v. Pantell SA and others (No 2)* [1993] 1 All ER 134 per Steyn LJ for the following example of a monetary adjustment: "The mere fact, for example, that the investor had sold on the shares would not by itself render the statutory remedy of rescission inapplicable. In such a case the counter restitution could be achieved by a financial adjustment based on the value of the shares. Rescission will only be impossible when financial adjustment is obstructed by circumstances going beyond the difficulty of valuation of investments which have been sold on: see *Birks, An Introduction to the Law of Restitution* (1985) p. 423") (on the fundamental difference between rescission *ab initio* and rescission *de futuro*, see *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597, and *LSSC Development Sdn Bhd v. Thomas Iruthayam and Anor* [2007] 2 CLJ 434; [2007] 4 MLJ 1).

[12] In his paper "*Rescission*", the contents of which were taken from the book "*Equity Practice and Precedents*" by Finnane, Newton and Wood, Edmund Finnane thus remarked on the remedy at common law and the remedy in equity:

> The common law remedy of rescission is "self-help". A person entitled to rescind – for example, on the ground of fraud or duress – communicates his or her election to the other party and the agreement is thereby avoided. The equitable remedy of rescission is not selfhelp: it requires a court order, and the court has a discretion whether to grant it. To rescind at common law, it is not enough that a party has a recognized common law ground to do so – such as duress. In addition, that party needs to be in a position to restore the parties to their original state before the contract. **Money must be repaid and property returned**. If that cannot be done precisely, the contract cannot be rescinded at common law. This requirement is referred to as *restitutio in integrum*, and is applied quite strictly at common law. Where precise *restitutio in integrum* is not possible, a party may still be able to rescind on common law grounds, with the aid of equity. *Whilst equity does not insist on precise restitutio in integrum, it is said that equity requires substantial restitutio in integrum, or that, by the exercise of its powers, it can do what is practically just between the parties, and by so doing restore them substantially to the status quo*. Equity has a broader array of remedies available to it than the common law, which it can use to achieve substantive restitution. For example, relief can be granted on conditions, or accounts and inquiries can be ordered so as to work out what adjustments need to be made between the parties. The form in which rescission is effected is that orders for accounts, payment of money, specific restitution and so on are made, together with a declaration that the plaintiff has validly rescinded the contract. *That is to say, rescission is still the act of the plaintiff: the court makes orders which adjust the rights of the parties and declares that the rescission was valid.* (emphasis added)

[13] Hence in the instant case, where it was Travelsight's election to rescind the purchase and the court was only moved to validate the antecedent act of rescission by Travelsight, it was rescission at common law, where *restitutio ad integrum* was *de riqueur*. "Where a transaction is rescinded there must be full restitution on both sides. The defendant must make restitution to the claimant and the claimant will make counter-restitution ... In short, rescission of a transaction requires mutual restitution by both parties. It is through restitution and counter-restitution that the effects of the transaction will be reversed and the parties put back to the position in which they were before they entered into it" (*Duress, Undue Influence and Unconscionable Dealing*, *supra*, para. 28-015). There must be mutual restitution. "There ought … to be a giving back and a taking back on both sides" (*Newbigging v. Adam* (1886) 34 Ch D 582 at p. 595 per Bowen LJ). Money must be repaid and the property returned. Atlas/liquidators must make restitution of the purchase price before counter-restitution of the property. But in spite of the order dated 15 November 2002, Atlas/liquidators refused to refund the purchase price but yet claimed the property, which with respect was the exact scenario that Kang Hwee Gee J said would not happen. But Kang Hwee Gee J was absolutely right that the property would not vest with Atlas/liquidators without restitution of the purchase price. For without restitution of the purchase price, the property would remain with Travelsight as purchaser and RHB as assignee. Given that the property remained with Travelsight as purchaser and RHB as assignee, but which property was lost only because of sale by the liquidators, it could not be contended, as did Atlas/liquidators, that Travelsight was an unsecured creditor.

[14] Rather, upon rescission of the purchase, it should be asked as to whether Travelsight had a proprietary right to the refund, as counter-restitution of the property was tied to the refund, and also as to whether Atlas/liquidators could assert ownership of the property without refund of the purchase price. "When a contract is rescinded it has the effect of revesting any property transferred in the transferor, so far as no formal steps are required for the retransfer. Thus property in goods will revest in the victim of fraud without more. If land has been conveyed, rescission will have the effect that the representor holds the title on constructive trust for the representee" (*Chitty on Contracts*, 13th edn., vol. 1, paras. 6-114; see also *Greater Pacific Investments Pty Ltd (in Liq) v. Australian National Industries Ltd* (1996) 39 NSWLR 143 at 153). "A contract obtained by fraudulent misrepresentation is voidable, not void, even in equity. The representee may elect to avoid it, but until he does so the representor is not a constructive trustee of the property transferred …" (*Lonrho Plc v. Fayed (No 2)* [1992] 1 WLR 1 at 11 per Millett J). "Upon a valid rescission of a contract at common law the legal title to the property which had passed to the wrongdoer automatically revests in the complainant. This is the case in relation to rescission on the ground of fraudulent misrepresentation

(for rescission on the ground of innocent misrepresentation, see *Admiral Cove Development Sdn Bhd v. Balakrishnan Devaraj & Anor* [2011] 9 CLJ 133; [2011] 5 MLJ 309, and *Sim Thong Realty Sdn Bhd v. Teh Kim Dar* [2003] 3 CLJ 227; [2003] 3 MLJ 460) ... A complainant to whom legal title to property has been revested by rescission is entitled to advance a proprietary claim over the property or its traceable substitute ... it is not in every case that legal title to property will automatically revest in the complainant by means of rescission at common law … In cases where rescission at common law will not result in automatic revesting of legal title in the complainant, rescission may be sought in equity" (*Duress, Undue Influence and Unconscionable Dealing*, *supra*, paras. 28-012). "When a contract is rescinded in equity there is no automatic revesting of the legal title to property transferred under the contract. However, when granting rescission in equity, the court has powers to make appropriate orders for revesting of legal title … the court recognises that, upon rescission of the contract, the beneficial title, which had passed to the transferee, revests in the transferor. The revesting is retrospective, since it seeks to put the complainant (transferor) in the position in which he would have been if the parties had not entered into the contract. This retrospective revesting gives the transferor a sufficient proprietary title to trace and recover the property. In the case of rescission on the ground of fraud, the revesting of equitable title takes effect from the date of the complainant's election to rescind the contract rather than the subsequent date when a court declares the complainant had the right to rescind" (*Duress, Undue Influence and Unconscionable Dealing*, *supra*, para. 28-013).

[15] "Legal title to land and chattels is generously protected." (*Goff & Jones, The Law of Restitution*, 6th edn., *supra*, para. 2-003). Upon rescission, beneficial title to property revests with the transferor. But upon rescission, would beneficial title to money also revests with the transferor? "According to the restatement (of restitution), American law … makes no difference that the disputed subject-matter is money rather than land or other property" (*Proprietary Remedies in Insolvency: A Comparison of the Restatement (Third) of Restitution and Unjust Enrichment with English and Commonwealth Law* by Anthony Duggan, 68 Wash & Lee L Rev 1229). But English case law is not as clear-cut. In *Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd* [1981] Ch 105, where by mistake, the plaintiff paid to the defendants some $2 million, Goulding J held that "a person who pays money to another under a factual mistake retains an equitable property in it and the conscience of that other is subjected to a fiduciary duty to respect his proprietary right". But the reasoning of Goulding J was doubted by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v. Islington London BC* [1996] AC 669, where the bank had advanced funds to the local authority with the intention that the funds should become the absolute property of the local authority but the loan contract was *ultra vires*. In the same case, Lord Goff rejected the submission that the local authority was the bank's trustee:

> … why should the plaintiff bank be given the additional benefits which flow from a proprietary claim, for example the benefit of achieving priority in the event of the defendant's insolvency? After all, it has entered into a commercial transaction, and so taken the risk of the defendant's insolvency, just like other creditors who have contracted with it, not to mention other creditors to whom the defendant may be liable to pay damages in tort.

[16] Even so, Lord Browne-Wilkinson observed that a constructive trust could arise if the payee bank's conscience was affected:

> However, although I do not accept the reasoning of Goulding J, Chase Manhattan may well have been rightly decided. The defendant bank knew of the mistake made by the paying bank within two days of the receipt of the moneys: see at p. 115A. The judge treated this fact as irrelevant (p. 114F) but in my judgment it may well provide a proper foundation for the decision. Although the mere receipt of the moneys, in ignorance of the mistake, gives rise to no trust, the retention of the moneys after the recipient bank learned of the mistake may well have given rise to a constructive trust: see *Snell's Equity*, p. 193; *Pettit, Equity and the Law of Trusts*, 7th ed. (1993) p. 168; *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc* [1990] 1 Q.B. 391, 473-474.

[17] At p. 716, Lord Browne-Wilkinson suggested that "the court by way of remedy might impose a constructive trust on a defendant who knowingly retains property of which the plaintiff has been unjustly deprived" (Goff and Jones, *The Law of Unjust Enrichment*, 8th edn., para. 37-22 and *Wuhan Guoyu Logistics Group Co Ltd & Anor v. Emporiki Bank of Greece SA* [2013] EWCA Civ 1679 doubted the soundness of Lord Browne-Wilkinson's analysis – "the retention of the moneys after the recipient bank learned of the mistake may well have given rise to a constructive trust"; *Despina Papamichael v. National Westminster Bank and Anor* [2003] EWHC 164 (Comm) agreed with Lord Browne-Wilkinson but saw no reason why proprietary remedy could not arise from mistake – see para. 224). At pp. 714-715, Lord Browne-Wilkinson thus described the difference between a "remedial" constructive trust and an "institutional" constructive trust:

> Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.

[18] That description of the difference between a "remedial" constructive trust and an "institutional" constructive trust is widely cited. But the suggestion that English law should introduce the remedial constructive trust was rejected by the Court of Appeal in *Halifax Building Society v. Thomas* [1996] Ch 217 and in *Re Polly Peck (No. 2)* [1998] 3 All ER 812.

[19] In *Re Goldcorp Exchange Ltd (In Receivership): Kensington v. Liggett* [1994] 3 NZLR 385, it was proposed that proprietary interest should be imposed retrospectively through restitutionary remedies to the moneys originally paid. The Privy Council per Lord Mustill disagreed:

> Whilst it is convenient to speak of the customers "getting their money back" this expression is misleading. Upon payment by the customers the purchase moneys became, and rescission or no rescission remained, the unencumbered property of the Company. What the customers would recover on rescission would not be "their" money, but an equivalent sum. Leaving aside for the moment the creation by the Court of a new remedial proprietary right, to which totally different considerations would apply, the claimants would have to contend that in every case where a purchaser is misled into buying goods he is automatically entitled upon rescinding the contract to a proprietary right superior to those of all the vendor's other creditors, exercisable against the whole of the vendor's assets. It is not surprising that no authority could be cited for such an extreme proposition. The only possible exception is *Re Eastgate* [1905] 1 KB 465. Their Lordships doubt whether, correctly understood, the case so decides, but if it does they decline to follow it.

[20] Still, the possibility of a proprietary remedy was left open by the Privy Council. Etherton J in *London Allied Holdings Ltd v. Lee and Others* [2007] EWHC 2061 (Ch) observed: "There is considerable debate and uncertainty in English law as to whether the court will ever hold, and if so when, that a remedial constructive trust has arisen. The conventional view is that English law only recognises an institutional constructive trust. Any possibility of a remedial constructive trust was robustly rejected by Nourse LJ in *Re Polly Peck International plc (No. 2)* [1998] 3 All ER 812 at pp. 830-832; see also *Westdeutsche* at p. 714F/G". On the other hand, Etherton J also noted that "in *Metall und Rohstoff AG v. Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at p. 479H the Court of Appeal (Slade, Stocker and Bingham LJJ) said that they were satisfied that there is a good arguable case that circumstances may arise in which the court would be prepared to impose a remedial constructive trust; and Lord Browne-Wilkinson in *Westdeutsche* at p. 716G considered that the remedial constructive trust might be a suitable basis for developing proprietary restitutionary remedies, for example against a defendant who knowingly retains property of which the plaintiff has been unjustly deprived. The possibility of such a proprietary remedy was also left open by the Privy Council in *Re Goldcorp Exchange Ltd* at p. 104". Etherton J did not reached a concluded view on the remedial constructive trust.

[21] But we perceive that the notion of a remedial constructive trust is already part of English law. In *El Ajou v. Dollar Landholdings plc* [1993] 3 All ER 717, Millett J said that if a person "(has) been induced to purchase the shares by false and fraudulent misrepresentations, they are entitled to rescind the transaction and revest the equitable title to the purchase money in themselves, at least to the extent necessary to support an equitable tracing claim". The Court of Appeal in *Twinsectra Ltd v. Yardley and others* [1999] All ER (D) 433 agreed: "There is also authority to be found in *El Ajou v. Dollar Land Holdings plc* … that monies of the plaintiffs paid away by the plaintiffs in reliance on a fraudulent share selling scheme gave rise to an 'old fashioned institutional resulting trust'". Rimer J in *Shalson and Others v. Russo and Others* [2003] EWHC 1637 (Ch) expressly agreed with Millett J Rimer J then reviewed a long list of authority supporting a proprietary right and then held "that upon the implied rescission of the loan contracts effected by the bringing of his Part 20 claim, Mr Mimran had revested in him the property in the money he advanced to Westland entitling him at least to trace it into assets into which it was subsequently applied". In *Otkritie International Investment Management Ltd and Others v. Urumov (also known as George Urumov) and Others* [2014] EWHC 191 (Comm), Eder J ruled that "The effect of such rescission is to revest equitable title to the money in OML and, in principle, to entitle OML to proprietary relief including declarations of ownership of specific assets and various consequential orders".

[22] In another setting, in *Foskett v. McKeown* [2000] 3 All ER 97, where the premiums of a whole-life policy were partly paid from deposits held upon trust for the claimants, the House of Lords held that the policy money which were paid to the trustees of the policy, were held on trust for the claimants and others. "Lord Browne-Wilkinson and Lord Millett (Lord Hoffman concurring) emphasised that the claim was an equitable proprietary one, the claimants had 'a continuing beneficial interest' not only in the money held on trust for them, but also in its traceable proceeds … The claim in *Foskett* was to the substituted asset, namely the policy moneys; Their Lordships had no doubt that this was a proprietary claim … " (*Goff & Jones*, *supra*, paras. 2-2006 and 2-2007). "Both Lord Browne-Wilkinson and Lord Millett were clear that the law of property protects pre-existing rights. So in *Foskett* the source of the claimants' property rights was their equitable title to the money used to pay the fourth and fifth premiums of the policy" (*Goff & Jones*, *supra*, paras. 2-2006 and 2-2008).

[23] *Goff and Jones*, *supra*, at para. 2-010, observed that a court may create a proprietary right if the defendant's conduct is unconscionable, in the light of the decision in *Lord Napier and Ettrick and Another v. Hunter and Others; Lord Napier and Ettrick v. R F Kershaw Ltd and Others* [1993] AC 713, where it was held that "Where an insured person was paid out by an insurer for an insured loss in respect of which he also recovered damages from a wrongdoer the insured person was guilty of unconscionable conduct if he did not procure and direct that the sum due to the insurers by way of subrogation be paid out

of those damages, and in order to protect the rights of the insurer under the doctrine of subrogation the damages recovered by the insured from the wrongdoer in respect of the insured loss were subject to an enforceable equitable proprietary lien or charge in favour of the insurer".

[24] In *Halley v. The Law Society* [2003] EWCA Civ 97, para. 105, the Court of Appeal per Mummery and Hale LJJ thus enunciated on equity, the conscience of the legal owner, and resulting trust:

> Equity, operating as it does on the conscience of the legal owner, will not assist Mr Halley's to enforce against the legal owner a claim to a beneficial interest in the balance of the arrangement fee held in Mr Wilson-Smith's client account. His claim is founded on his own part in the fraud. He has no right to, or reasonable expectation of, assistance from the court in reaping the rewards of his fraudulent efforts. For this reason the purported disposition of a beneficial interest in the arrangement fee in his favour is, and was from the very beginning, unenforceable by him. It fails. Upon its failure the arrangement fee is held instead upon a resulting trust for the particular applicant who paid it.

[25] Other notable decisions which upheld proprietary title in money paid were *Banque Belge pour l'Etranger v. Hambrouck* [1921] 1 KB 321, where Bankes and Atkin LJJ held that the plaintiff bank could follow its money at law and in equity, both the legal and equitable titles having revested in the bank when it commenced proceedings against *Hambrouck, and Lipkin Gorman v. Karpnale Ltd* [1991] 2 AC 548, "where the House of Lords took the momentous step of acknowledging the existence of an autonomous cause of action in unjust enrichment, which has been consistently affirmed in subsequent decisions" (*The Law of Trust and Equitable Obligations* 4th edn. by Professor Robert Pearce and John Stevens, p. 324).

[26] " … case law (therefore) suggests that on occasions, a court may create a proprietary right, and may do so for a number of diverse reasons … " (*Goff & Jones*, *supra*, para. 2-010).

[27] A proprietary remedy may also be awarded where it is appropriate. In *Lonrho plc v. Fayed (No. 2)* [1992] 1 WLR 1, 9, Millett J cited the following passage from *Meagher, Gummow and Lehane's, Equity, Doctrines and Remedies*, 2nd edn., p. 327, which said that when appropriate the court would grant a proprietary remedy:

> When appropriate, the court will grant a proprietary remedy to restore to the plaintiff property of which he has been wrongly deprived, or to prevent the defendant from retaining a benefit which he has obtained by his own wrong. It is not possible and it would not be desirable, to attempt and exhaustive classification of the situations in which it will do so. Equity must retain what has been called its inherent flexibility and capacity to adjust to new situations by reference to the mainsprings of equitable jurisdiction.

[28] In *LAC Mineral v. International Corona Resources Ltd* (1989) 61 DLR (4th) 14, the Canadian Supreme Court per La Forest J observed that "there is no unanimous agreement on the circumstances in which a constructive trust will be imposed" and identified a number of factors that may be relevant in determining whether to award a proprietary remedy:

> A constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. Among the most important of these will be that it is appropriate that the plaintiff receive the priority accorded to the holder of a right of property in a bankruptcy. More important in this case is the right of the property holder to have changes in value accrue to his account rather than to the account of the wrongdoer … The moral quality of the defendants' act may also be another consideration in determining whether a proprietary remedy is appropriate. Allowing the defendant to retain a specific asset when it was obtained through conscious wrongdoing may so offend a court that it would deny to the defendant the right to retain the property.

[29] In *Muschinski v. Dodds* (1985) 62 ALR 429, the High Court of Australia per Deane J thus enunciated on the remedial constructive trust in Australia:

> The acknowledgment of the institutional character of the constructive trust does not involve a denial of its continued flexibility as a remedy (cf *Wirth v. Wirth* (98 CLR) at p 238. The institutional character of the trust has never completely obliterated its remedial origins even in the case of the more traditional forms of express and implied trust. This is a *fortiori* in the case of constructive trust where, as has been mentioned, the remedial character remains predominant in that the trust itself either represents, or reflects the availability of, equitable relief in the particular circumstances. Indeed, in this country at least, the constructive trust has not outgrown its formative stages as an equitable remedy and should still be seen as constituting an in personam remedy attaching to property which may be moulded and adjusted to give effect to the application and inter-play of equitable principles in the circumstances of the particular case … The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles … Viewed as a remedy, the function of the constructive trust is not to render superfluous, but to reflect and enforce, the principles of the law of equity.
>
> Thus it is that there is no place in the law of this country for the notion of "a constructive trust of a new model" which, "by whatever name it is described, … is … imposed by law whenever justice and good conscience" (in the sense of "fairness" or what "was fair") "require it" (per Lord Denning MR, *Eves v. Eves* [1975] 1 WLR 1338 at 1341, 1342 ; [1975] 3 All ER 768 at 771, 772 and *Hussey v. Palmer* [1972] 1 WLR 1286 at 1289–90; [1972] 3 All ER 744 at 747).

[30] Apparently, "the remedial constructive trust has been accepted in Australia, New Zealand and Canada" (*Modern Equity* by Hanbury & Martin, supra, p. 328), upheld in Singapore (see *Ching Mun Fong v. Liu Cho Chit*, [2001] 3 SLR 10) and Hong Kong *(UBS AG v. Stand Ford International Enterprises Ltd & Ors* [2002] 3 HKC 621) and accorded recognition by the Court of Appeal in *Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors And Another Appeal* [2009] 2 CLJ 363; [2009] 1 MLJ 289. And as pointed out by Rimer J in *Salson v. Russo* at 321-323, and in these grounds, *In re Eastgate* is hardly the only authority for the proposition that "where a purchaser is misled into buying goods he is automatically entitled upon rescinding the contract to a proprietary right superior to those of all the vendor's other creditors, exercisable against the whole of the vendor's assets". It is clear that a proprietary restitutionary right to money could be asserted. But is this an appropriate case to grant a proprietary remedy? To capitulate, by letter dated 2 April 1997, Atlas confirmed that the full purchase price had been paid. Since already paid, then the property belonged to Travelsight as purchaser and RHB as assignee, whose respective interest as purchaser and assignee would be registered after the issuance of a document of title. And since already paid, the property ceased to be the legal and or beneficial property of Atlas. But was that affected by rescission? First, it should be underscored that rescission on the ground of fraud was validated by an order of court (dated 5 November 2002). Rescission was an accomplished fact, at least in law. By right, *restitio in integrum* should follow. There should be full restitution by both sides. But mutual restitution did not follow. Atlas seized on the part of the order that validated rescission, but refused to honour the part of the order that ordered refund, with the result that Atlas retained both property and purchase price, while only entitled to one. In defence of their action, Atlas and liquidators contended that Travelsight was an unsecured creditor who ranked *pari passu* with other unsecured creditors, while they, the liquidators, were free to deal with the property as an unencumbered asset. But was it valid to contend that Atlas and liquidators were free to deal with the property as an unencumbered property, without a corresponding refund of the purchase price as ordered? As said, when the full purchase price was paid in 1997, the property belonged to Travelsight as purchaser and RHB as assignee. As of 1997, the property ceased to be an asset of Atlas. But with rescission, the property would revert to Atlas, that is, by way of mutual restitution. That is the same as to say that without mutual restitution, the property would not revert to Atlas. Atlas had to refund the purchase price to take back the property. We are mindful that "a constructive trust (in the remedial sense) arises whenever the circumstances are such that it would be unconscionable of the owner of the legal title to assert his own beneficial interest and deny the beneficial interest of another. It arises from circumstances which are, *ex hypothesi*, known to the legal owner, for if they were not his conscience would not be affected" ("*Restitution and Constructive Trusts*" 1988 Law Quarterly Review Vol 114 p. 399, per Millett LJ at 400). "A constructive trust is the formula through

which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee" (*Beatty v. Guggenheim Exploration Co*, 122 NE 378, at p. 388 (NY 1919) per Cardozo J).

[31] It could be reasonably assumed that the circumstances that would have been known to Atlas and liquidators were: (i) the full purchase price had been paid; (ii) the property belonged to Travelsight as purchaser and RHB as assignee; (iii) the order dated 15 November 2002 validated rescission and ordered a refund of the purchase price; and, (iv) the purchase price had not been refunded. Given those latter circumstances that would have been known to them, it could be further assumed that Atlas and liquidators should have known that the property was not that of Atlas to deal and dispose as its own. Fairly said, the circumstances that would have been known to Atlas and liquidators were such that it would be unconscionable of Atlas and liquidators to treat the property as its unencumbered asset and deny the beneficial interest of Travelsight and RHB. The circumstances were such that gave rise to a constructive trust, in the remedial sense, which equity imposed on Atlas and liquidators, to deal not with the property as its beneficial property (on the duty imposed by equity to account to the true owner of money or property, see also *Koh Siew Keng & Anor v. Koh Heng Jin* [2008] 3 CLJ 450; [2008] 3 MLJ 822). The effect of the order dated 15 November 2002 was such that the property would only vest with Atlas upon mutual restitution. Otherwise, the liquidators could not deal with the property as the beneficial property of Atlas. And the effect of the order 15 November 2002 was that until mutual restitution, the assets in the hands of the liquidators properly representing the appellant's refund at the date of commencement of winding up did not belong to Atlas (see *Chase Manhattan v. Israel-British Bank* at 120). Indeed, upon failure of mutual restitution, there arose a resulting trust, as reversion of the property to Atlas was wholly reliant on mutual restitution. Yet, with knowledge of the circumstances that would have been known to them that gave rise to a constructive trust with respect to the refund, and a resulting trust in the event of failure of mutual restitution, Atlas and liquidators still disposed of the property on 16 June 2011, and refused to refund the purchase price, in defiance of the order dated 15 November 2002 and in breach of the duty imposed by equity to account. That conduct, certainly beyond the pale, was wholly unconscionable, which itself is ground enough to grant the proprietary remedy. Now given further that there was an order of court to refund, a constructive trust and a resulting trust as aforesaid, and that the refund was in exchange of property that belonged to Travelsight as purchaser and RHB as assignee, the grounds are in surfeit to hold that Travelsight and RHB had a proprietary right, rather than and as opposed to a personal claim, to the refund.

[32] Equity had a general jurisdiction in setting aside contracts to ensure the observance of the requirements of good conscience and practical justice … In seeking to do what was practically just between the parties, in a case involving fraud, the court exercised its jurisdiction to the full in order if possible to prevent a party enjoying the benefit of his fraud …" (*Vadasz v. Pioneer Concrete (SA) Pty Ltd* (1995) 130 ALR 570, High Court of Australia, Deane, Dawson, Toohey, Gaudron and McHugh JJ). Atlas should not be allowed to benefit from rescission without restitution on its part. No order could be made in favour of Atlas and liquidators. Rather, the order should be that Travelsight as purchaser and RHB as assignee had a proprietary right to the refund.

[33] However, in view of the order dated 15 November 2002 which had supplanted the provisions of the loan agreement that pertained to the property and its redemption, there should not have been that order by the courts below to RHB to reassign the property to Travelsight. Both Travelsight and RHB had agreed to rescission. When they applied for the order dated 15 November 2002, they explicitly agreed to relinquish their respective title and interest in the property in exchange for a refund of the purchase price. Upon the grant of the order dated 15 November 2002, the property was effectively relinquished by both Travelsight and RHB. Hence, as against RHB, when both had agreed to a refund *in lieu* of property, Travelsight could not later ask for a reassignment of the property that it, together with RHB, had willingly relinquished.

[34] It comes to this. Travelsight had a proprietary right to the refund. But the refund was not paid. By right, the property remained with Travelsight as purchaser and RHB as assignee. But that the property had been sold. To pronounce that the property remained with Travelsight and RHB would only be idle. In *Spence v. Crawford* [1939] 3 All ER 271 at p. 290 Lord Wright stated that the equitable remedy of rescission, when applied, must be moulded in accordance with the exigencies of the particular case. To do practical justice (see *Solle v. Butcher* [1950] 1 KB 671 at p. 696 per Lord Denning), there should be a consequential order, to the liquidators to forthwith pay the refund to Travelsight, as RHB had been repaid.

[35] We now answer the leave questions in English, which also answer the leave questions in Bahasa Malaysia, as follows:

Question 1:

An assignment of the rights, title and benefit of a sale and purchase agreement is between a purchaser/borrower and a bank, whilst the rescission of a sale and purchase agreement is between purchaser and vendor.

The assignment is the security of the bank. But that security of the bank will be lost upon a valid rescission of the sale and purchase agreement. The security may be lost. But the assignment remains, and the bank is

nonetheless the assignee of the rights that will accrue to the borrower upon rescission of the sale and purchase agreement. Hence, while the order of rescission will affect the security of the bank, it will not affect the assignment nor the standing of the bank as assignee and or creditor of the borrower, or the equitable right of the bank to lay first claim to the money or property to be restituted, to discharge the outstanding loan.

Question 2:

In the instant case, where both borrower and bank had agreed to relinquish the property and what would be restituted was a refund of money, it would be unreasonable to hold the bank to reassign property. After rescission, Travelsight could not rely on the sale and purchase agreement to give it a clear title to the property, such that Travelsight could not rely on the assignment to give it that clear title (for an analogy, see Independent *Trustee Services Ltd v. GP Noble Trustees Ltd* [2012] EWCA Civ 195 at [52]). At most, the bank could only be held to assign the proprietary right to the refund and or the rights for enforcing the same.

[36] For the above reasons, we unanimously dismiss the appeal of Atlas and liquidators with costs. Travelsight had a proprietary right to the refund which ought to have been restituted in 2002 and so could not be further withheld. Consequently, we order Atlas and liquidators to forthwith refund the purchase price together with all interests thereon, computed as per order dated 15 November 2002, to Travelsight.

[37] Finally, we unanimously allow the appeal of RHB and set aside all orders of the courts below, save and except for the declaration that Travelsight had paid the full purchase price.